

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 7, 2008

STATE OF TENNESSEE v. CHRISTOPHER LEE PIRTLE

Appeal from the Criminal Court for Davidson County
No. 2005-D-3036 Monte Watkins, Judge

No. M2007-02577-CCA-R3-CD - Filed April 23, 2009

The defendant, Christopher Lee Pirtle, was convicted by a Davidson County jury of one count of aggravated robbery, a Class B felony, for which he received a sentence of ten years as a Range I, standard offender. In this appeal as of right, he contends that the evidence is insufficient to support his conviction, that the trial court erred in admitting evidence regarding firearms found at the defendant's arrest, and that the trial court imposed an excessive sentence. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. McMULLEN, JJ., joined.

Autumn A. Eggleston (on appeal); and Jeremy Parham (at trial), Nashville, Tennessee, attorneys for appellant, Christopher Lee Pirtle.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Roger Moore, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

A Davidson County Grand Jury indicted the defendant for the August 2, 2005 aggravated robbery of Amanda Corun. The victim testified that she lived in McMurrey Apartments on Nolensville Pike on August 2, 2005. She stated that as she and her eleven-year-old son, Preston, returned home that evening, she stopped to check her mail at the central mailbox in the apartment complex. She recalled that her son got out to check the mail while she waited in the car. Suddenly, she realized that a gun was pointed at her driver's side door and locked her doors. She described the assailant as a younger black male, tall but normal weight. She recalled that he wore a dark-colored bandana tied just below his nose. The assailant then pointed the gun at her son so she unlocked the

doors to run away. As she reached for her purse, the assailant told her, "Leave it." The victim fled from her vehicle and ran away with her son. She testified that she was too scared to look back but might have heard the assailant squeal away as he stole her car, her purse and cellular telephone. She said that someone in the parking lot heard her screaming and helped her by letting her use their cellular telephone.

The victim testified that her car was recovered by the police but that she immediately sold it. She also recalled looking at two photographic lineups but being unable to identify the defendant with "a hundred percent" confidence; she also stated that she never eliminated anyone from the lineups as being her assailant. She said that by the morning after the robbery, she began canceling credit cards but that some unauthorized purchases had already been made at convenience stores and Wal-Mart. The victim recalled that the defendant was arrested and charged with the robbery within a month of its occurrence. She testified that she was always confident that she would remember her assailant's eyes, and that upon first seeing the defendant in court she was able to identify him as the man who had robbed her. The victim identified items as hers that were recovered by the police and returned to her after the defendant's arrest, including several compact discs with her name on them and a pink cellular telephone case. The victim also identified a dark colored bandana as one similar to that worn by her assailant during the robbery. A black and silver pistol was shown to the victim who confirmed it was "the same style" as the one used in the robbery. When asked if there was any doubt in her mind that the defendant was her assailant she stated, "No. There is no doubt."

On cross-examination, the victim identified the defendant's photograph from one of the lineups shown to her during the investigation. She again explained that she did not want to identify anyone without being one hundred percent sure; she also stated that people look different in person than in photographs and that "[a]s soon as [the defendant] walked through that door [in court] I recognized him."

The victim's son, Preston Corun, testified that he "recall[ed] a guy coming up while I was checking the mail. He pointed a gun at my head and covered his mouth with his finger and told me to be quiet, and pointed the gun at my mom at the window at the car." He described the assailant as a young, black male wearing blue jeans and a white shirt with a dark blue bandana over his mouth. On cross-examination, Preston described the gun as an automatic, black with a little silver on the top.

Metropolitan Nashville Police Department Officer Thomas Simpkins testified that he has been an officer with the identification section for over sixteen years. He explained that the identification section is responsible for processing crime scenes and that he processed the victim's stolen vehicle as part of this investigation. He testified that he processed a cup found in the car for the presence of latent fingerprints. He also processed areas on the driver's side door and the rearview mirror. On cross-examination, Officer Simpkins acknowledged that the car was recovered five days after the robbery and that there was no way of knowing who had been in the vehicle or when during that time period a person had been in the vehicle.

Metropolitan Nashville Police Department Officer Larry Farnow testified that he has been working in the latent fingerprint division of the identification section for eleven years. He did the fingerprint comparisons on those found by Officer Simpkins on the stolen vehicle. Through detailed analysis and verification, Officer Farnow was able to determine that a fingerprint lifted from the rearview mirror matched the defendant. He testified that “[t]here is no doubt in my mind” that the fingerprint was a match to the defendant.

Metropolitan Nashville Police Department Sergeant Julian Moore testified that he assisted in the search of the defendant’s residence on August 20, 2005. He recalled that the defendant lived about two miles from the victim’s residence. Sergeant Moore described the residence as disheveled with items scattered throughout the apartment. When asked if he had seen anything that “might be out of place,” Sergeant Moore recalled that “I saw a Neil Diamond CD. And I just thought, I doubt, there’s very many carjacker’s [sic] listening to Neil Diamond.” The detectives called the victim and she was able to identify the Neil Diamond CD as hers. Sergeant Moore testified that several other compact discs and items belonging to the victim were found in the defendant’s residence. On cross-examination, he acknowledged that the defendant was not present when they conducted the search and that there was no way of knowing when the defendant had last been to the apartment.

Metropolitan Nashville Police Department Sergeant Joseph Winter testified that he worked with Detective Almose Thompson and Officer Greg Smith in investigating the robbery. Detective Thompson was unavailable to testify at the trial, as was Officer Smith, who had been deployed to Iraq. Sergeant Winter testified that they reviewed surveillance tapes of several stores based upon dates and times of purchases revealed in unauthorized credit card receipts. From the tapes, they obtained digital photographs of the defendant and several females using the victim’s credit cards at various locations. Sergeant Winter also assisted in the search of the defendant’s residence. He discovered a Wal-Mart receipt and the victim’s cellular telephone case in the kitchen sink. On cross-examination, Sergeant Winter stated that none of the surveillance photographs show the defendant using the victim’s credit card; but the defendant was present while several females used the credit card. In fact, the defendant was not present in any surveillance photographs from the Shell gas station. Sergeant Winter also admitted that the defendant was arrested on August 17 – three days before the search of his residence on August 20 – and that the residence was not under surveillance at any time during the investigation to account for persons who may have frequented the apartment.

Metropolitan Nashville Police Department Detective Matthew England testified that on August 17, 2005, the defendant drove past him in the stolen vehicle so he called for backup and approached the vehicle once it stopped in front of a house. As the defendant and a male passenger emerged from the vehicle, Detective England ordered them to the ground with their hands above their heads. The passenger complied but the defendant, who was holding an unidentified black object near his waistband, attempted to run up the driveway of the residence. As the detective watched the defendant, the defendant “appear[ed] to be retrieving the object from his waistband, and also turned in [the detective’s] direction.” Detective England testified that he was prepared to fire on the defendant at that point because he “felt as [the defendant] was fixing to open fire upon me.”

He stated that he was “[e]xtremely close” to firing when a woman ran out of the house into the line of fire and “broke the tension,” enabling the defendant to run away.

Detective England took the passenger into custody as another officer captured the defendant. The black object was retrieved from the defendant’s waistband upon apprehension and was identified as a loaded semiautomatic pistol that could hold up to “thirty plus rounds.” A silver-barreled nine millimeter pistol was also recovered from the passenger, who was a juvenile. Detective England testified that he could not confirm that either weapon was used in the robbery. Two dark-colored bandanas similar to the one used by the assailant were also found in the vehicle. Detective England testified that the defendant identified himself to authorities as James Brown.

ANALYSIS

Sufficiency of the Evidence

The defendant argues that the evidence is insufficient to support his conviction for aggravated robbery because (1) the victim was unable to conclusively identify the defendant from the photographic lineups shown to her and (2) the remainder of the evidence is circumstantial. The State contends that the evidence is sufficient to support the conviction. Following our review, we agree with the State.

An appellate court’s standard of review when the defendant questions the sufficiency of the evidence on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury’s verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

A conviction for aggravated robbery, as indicted in this case, requires proof beyond a reasonable doubt that the defendant committed an “intentional or knowing theft of property from the person of another by violence or putting the person in fear . . . accomplished with a deadly weapon.” Tenn. Code Ann. § 39-13-402(a)(1) (2006). Although the victim was not one hundred percent sure of a photographic identification, she testified that the defendant was “without a doubt” the person

who pointed a gun in her face and demanded her car containing her purse and other belongings. The jury accredited the victim's identification of the defendant as her assailant. Surveillance photographs show the defendant, with the assistance of various females, using the victim's credit cards to purchase items at several stores. A search of the defendant's apartment found the victim's stolen compact discs and cellular telephone case. Within weeks of the robbery, the defendant was arrested while driving the stolen vehicle. Upon his arrest, the defendant and a juvenile passenger were in possession of two handguns both similar to the one described by the victim and her son as the weapon used in the commission of the robbery. Based upon these facts, we conclude that the evidence is sufficient to support the defendant's conviction for aggravated robbery.

Admission of Handgun

The defendant contends that the trial court should not have admitted into evidence at trial the firearms recovered at the defendant's arrest because their probative value is substantially outweighed by the potential for unfair prejudice pursuant to Rule 403 of the Tennessee Rules of Evidence. The State contends that this issue has been waived by the defendant's failure to contemporaneously object to the admission of the weapons. Our review of the record confirms that the defendant failed to object to the admission of the two weapons at trial; the defendant likewise failed to file a pretrial motion to exclude their admission. Therefore, we conclude that this issue is waived. Tenn. R. Evid. 103(a)(1); Tenn. R. App. P. 36(a).

Sentencing

The defendant argues that the trial court erred in enhancing his sentence to ten years because the trial court should have given greater consideration in mitigation to the defendant's youth (eighteen years old at the time of the offense) and lack of adult criminal history. The State asserts that the defendant has waived this issue for appellate review by failing to cite to authority in support of his argument. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Alternatively, the State contends that the trial court's findings support the imposition of a sentence of ten years. We decline to consider this issue waived for failure to cite to authority because the defendant's brief does contain some citation to authority. However, following our review, we agree with the State that the trial court's sentence was appropriate.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, (7) the potential for rehabilitation or treatment, and (8) any statistical data provided by the Administrative Office of the Courts relative to state-wide sentencing practices for similar offenses. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991); State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

The defendant committed this offense in August 2005; thus, he was sentenced under the revised sentencing act as enacted by the Tennessee General Assembly in 2005. The act provides:

(c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c)(1)-(2) (2006).

The weight to be afforded an enhancement or mitigating factor is left to the trial court's discretion so long as its use complies with the purposes and principles of the 1989 Sentencing Act and the court's findings are adequately supported by the record. Id. § (d)-(f); State v. Carter, 254 S.W.3d 335, 342-43 (Tenn. 2008). "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in . . . the Sentencing Act." Carter, 254 S.W.3d at 346. Accordingly, on appeal we may only review whether the enhancement and mitigating factors were supported by the record and their application was not otherwise barred by statute. See id.

In imposing a sentence, the trial court may only consider enhancement factors that are "appropriate for the offense" and "not already . . . essential element[s] of the offense." Tenn. Code Ann. § 40-35-114 (2006). These limitations exclude enhancement factors "based on facts which are used to prove the offense" or "[f]acts which establish the elements of the offense charged." State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994). Our supreme court has stated that "[t]he purpose of

the limitations is to avoid enhancing the length of sentences based on factors the legislature took into consideration when establishing the range of punishment for the offense.” State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997); Jones, 883 S.W.2d at 601.

In imposing sentence, the trial court acknowledged the defendant’s young age at the time of the offense but added “here is a young man who, for whatever reason, has decided that a life of crime is more important than a life without crime.” Regarding his lack of adult criminal history, the trial court noted that “[h]e could not have built much of a criminal record – adult record, that is, because he had turned eighteen about eight months previously He does, in fact, have a previous history of criminal behavior, as indicated by his juvenile record.” Tenn. Code Ann. § 40-35-114(1) (2006). Additionally, the trial court found that the defendant had a history of unwillingness to comply with conditions of release into the community and that the present offense involved more than one victim. Id. § 40-35-114(3), (8). The trial court sentenced the defendant to ten years in the Department of Correction, which was within the eight-to-twelve-year range established for a defendant convicted of a Class B felony as a Range I, standard offender. Id. § 40-35-112(a)(2).

In this case, the enhancement factors relied upon by the trial court were supported by the record. The trial court’s weighing these enhancement factors, giving little weight to the mitigating factors argued by the defendant, and imposing a sentence within the range of punishment were within the trial court’s discretion. Accordingly, we affirm the ten-year sentence imposed by the trial court.

CONCLUSION

In consideration of the foregoing, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE